

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

741220

To be argued by
JOEL A. BRENNER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,

Appellee,

-v-

RALPH LOMBARDO,

Defendant-Appellant,

and

VINCENT ALOI, JOHN DIOGUARDI, and
JOHN SAVINO,

Defendants.
-----x

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P/S

BRIEF FOR APPELLANT LOMBARDO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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on the brief

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UNITED STATES COURT OF APPEALS
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RALPH LOMBARDO,

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VINCENT ALOI, JOHN DIOGUARDI, and
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Defendants.
-----x

Docket No.
74-1220

BRIEF FOR APPELLANT LOMBARDO

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Knapp, D.J.), rendered on February 5, 1974, wherein appellant Lombardo was convicted, after a jury trial, of conspiracy to violate the Securities Laws (15 U.S.C. Section 77q[a]) (count 1), wire fraud (18 U.S.C. Section 1343 (count 9), and using a fraudulent offering circular (15 U.S.C. Section 77s) (count 18), and sentenced to two concurrent five year prison terms on counts

1 and 18, plus five years probation on count 9, plus a total of sixteen thousand dollars in fines.^{*/}

Appellant Lombardo is presently incarcerated pursuant to the above judgment.

^{*/} The indictment (73 Cr. 699) originally named 16 co-defendants in 38 counts, but only four of the named persons stood trial until verdict. The defendant Fusco was severed during trial because of illness; three named defendants testified as government witnesses, and the remaining defendants were severed before trial. Also prior to trial, a count charging Lombardo with an extortionate credit transaction was severed.

QUESTIONS PRESENTED

1. Whether there was insufficient evidence to establish beyond a reasonable doubt that appellant Lombardo was a knowing member of a conspiracy to violate the securities laws of the United States or that he had the specific requisite intent to be convicted of having violated either the wire fraud or prospectus counts of the indictment.

2. Whether the refusal of the trial court to permit defense counsel to introduce evidence of Hellerman's ownership of, and interest in, several safe deposit boxes constituted reversible error where that evidence was relevant to show Hellerman's bias and favor.

3. Whether the introduction against Lombardo of evidence of uncharged crimes, and the lengthy cross-examination on this and other irrelevant and highly prejudicial subjects deprived him of a fair trial.

4. Whether the motion for a new trial should have been granted.

5. Whether appellant Lombardo was denied due process of law both because of the prejudice which resulted from his being jointly tried with appellant Dioguardi and because of the introduction of irrelevant and highly inflammatory evidence by the prosecution.

6. Whether the trial court committed reversible error by taking into account in sentencing appellant Lombardo's alleged perjury during the trial and his alleged membership in organized crime.

STATEMENT OF FACTS^{*/}

GOVERNMENT'S CASE

EDMOND GRAIFER testified that he had been a partner in a New Jersey company, At Your Service Leasing, and in 1969 had decided to take the company "public" (402).^{**/}

The company encountered difficulties in this venture and in May 1970 he asked Lombardo, who had leased cars from him, if he could help. Lombardo took him to Florida to see one Sebastian Aloi,^{***/} who suggested that they contact a Michael Hellerman (429-32, 475-76).

In early June 1970 Graifer said Lombardo drove him to the Riverboat Restaurant^{****/} where he met Jack Kelsey and Hellerman, who agreed to take AYSL public for \$45,000 "under the table." Hellerman said he had to consult with John Dioguardi and Lombardo before he could finally agree. They all drove to a building which

^{*/} In the interests of brevity, and to avoid unnecessary duplication, this Statement of Facts will be limited to a summary of the evidence against Appellant Lombardo and to a detailed account of his defense. The Court is respectfully directed to the Brief for Appellant Dioguardi for a fuller exposition of all the evidence at trial, and to the Brief for Appellant Aloi for a detailed setting forth of the jury voir dire.

^{**/} All numerical references are to the trial transcript, which has been furnished, in triplicate, to the Court (as has the jury voir dire).

^{***/} The father of Appellant Vincent Aloi.

^{****/} On the way appellant told Graifer that if Hellerman could do the deal he (appellant) wanted to be put on the AYSL payroll.

Lombardo and Hellerman entered without him. When they came out Hellerman said he could do the deal with \$22,500 "up front" and with Lombardo providing this money. Graifer then called Sebastian Aloï from a nearby cigar store phone booth and all three men spoke with him (481-91).

About a week later Graifer mentioned this deal to Pasquale Fusco and John Savino who told them Hellerman was a swindler who owed them \$10,000. Two days later Lombardo called and said the deal was off because Hellerman could not sell the stock (509-11, 516-17).

Griafer said he flew to see Sebastian Aloï to complain that Savino and Fusco had caused the deal to fall through. Sebastian called his son Vincent and then told Graifer everything would be taken care of (521-26).

Shortly after he returned Hellerman called and said the deal was on again but the terms had been changed so that from the \$45,000 Savino and Fusco would get their \$10,000 back, a \$10,000 debt to Lombardo would be paid off,^{*/} and John Dioguardi would get the rest. He went with Hellerman and Lombardo to the same building they had been to before, waited outside and when they came out Hellerman said everything was okay and no "front money" was needed. They all called Sebastian Aloï and said the deal was set (527-37).

^{*/} It was brought out, over strenuous objection, that this \$10,000 allegedly represented a loanshark loan from Lombardo to Hellerman (1727-29).

A "closing" on the stock offering took place in Hellerman's office in late July. Although it was after the offering period had expired Hellerman said all the papers would be back-dated. Lombardo was outside the room during these proceedings (541-45).

After the checks which had been given to Graifer finally cleared he cashed a \$45,000 check and gave the money to Lombardo; he also agreed to put him on the AYSL payroll (548-49, 553, 559).

Graifer testified under oath before the SEC in September and December 1970 and stated, inter alia, that Lombardo was AYSL's insurance consultant and his salary was for this work (1000-02)^{*/}; Graifer attempted to explain this testimony by saying Hellerman told him what to say before the SEC and Lombardo told him to do whatever Hellerman said (1147).

MICHAEL HELLERMAN testified that Lombardo told him about the AYSL deal in June 1970 and he agreed to do it for \$45,000 under the table and \$22,500 up front (1743, 1752, 1759).

He described the Riverboat Restaurant meeting (1764-65). He and Lombardo went to Dioguardi's office and agreed to the terms while Graifer waited downstairs. He and Lombardo then called Sebastian Aloï from a cigar store phone booth and Dioguardi came down and spoke. After Dioguardi left, Graifer entered and he spoke

^{*/} Graifer testified at trial that Lombardo performed no services but did make some collections during his employment from August 1970 through March 1971 (622, 665).

to Sebastian Aloï (1769-75).

Within a week Lombardo delivered the "front" money to Hellerman in Kelsey's presence (1784). Hellerman and Kelsey left and gave it to Ira Schultz who was to retail the stock (1778, 1787-88). (Schultz denied this meeting and arrangement [3691-3701]).

When no progress was made on the deal, Hellerman brought the \$22,500 back to Lombardo at Dioguardi's office. They discussed the possibility of doing the deal without the front money and Lombardo said he would talk to Sebastian Aloï (1770, 1791, 1801-03).

About a week later Lombardo said the deal could be done if Savino and Fusco got their \$10,000 back and he got his \$10,000 back^{*/}; Hellerman reluctantly agreed because he could use the \$25,000 to pay a debt to a man named Di Lorenzo. He and Lombardo went downstairs to Graifer and they all called Sebastian Aloï (1832-45).

Hellerman testified that after the closing checks had cleared appellant told him that the \$45,000 had been divided according to the terms of the deal (1873-74).^{**/}

^{*/} Hellerman testified that Lombardo did not want the money back as part of the deal and was willing to let Hellerman keep it (1867-74).

^{**/} JACK KELSEY (owner of a brokerage house Hellerman used during the AYSL deal) testified he met Lombardo in the Riverboat Restaurant when the AYSL deal was discussed and that he saw him at Dioguardi's office when the deal was originally confirmed and when the front money was delivered and returned (1516, 1518, 1525, 1530); he never saw him again (1533).

ANDREW NELSON (a partner in Tech-Ec, the firm that was being paid to help take AYSL public) testified that he "knew" Lombardo only because he'd seen him with Graifer, that he'd [cont'd, next page]

DEFENSE CASE^{*/}

RALPH LOMBARDO testified that he had no prior convictions (4613).^{**/}

In 1963 he was in an automobile accident that left his leg partially disabled and during his convalescence he took insurance courses and became a broker in 1966 (4616-17).

In 1967 Michael Hellerman owned a restaurant located near Lombardo's home (Michael's Steak House) which Lombardo frequented (4624). The bartender, who was named Philip Yovanovich, used to obtain "leads" for Lombardo's insurance and introduced him to

seen him in the anteroom during the AYSL closing, and that he had never discussed AYSL with him (2774-75, 2805, 2867).

MURRAY WINTER (Hellerman's attorney) testified he'd met Lombardo about three times and had been told by Hellerman that the AYSL deal came from him (3245-46, 3248).

STEVEN SCHOENGOLD (an employee at J. M. Kelsey) testified Hellerman once called him to a meeting at Dioguardi's office about AYSL but "Ralphy" did not appear; he never found out who "Ralphy" was (2994, 3002).

All of these witnesses were either unindicted, indicted or convicted accomplices and co-conspirators in the AYSL stock fraud.

^{*/}The Court is respectfully directed to the briefs of co-appellants for references to the evidence presented on behalf of Dioguardi and Aloï. Suffice it to say that Dioguardi took the stand and explicitly denied any participation in the AYSL deal or any connection with Hellerman in any stock frauds (4295-96, 4383, 4458-61) and introduced other evidence contradicting Hellerman (testimony of Ira Schultz at 3803 and Joseph Bald at 3851) as did Vincent Aloï (5047).

^{**/}Lombardo had been arrested in 1971 for the transportation of stolen property in interstate commerce; the case was dismissed at the close of the government's case (4608-10). The government used copies of documents seized from Lombardo during that arrest in its attempt, on cross-examination, to prove he was a loanshark.

Heller man. He studied Heller man's personal and business insurance policies but never wrote any insurance for him (4620-21).^{*/}

In 1969 a friend of his named Charles San Filippo introduced him to Edmond Graifer to see if he could help Graifer with some of AYSL's insurance problems (4624-26).

He learned Graifer was a loanshark^{**/} and borrowed \$4,000 in December 1969 and \$5,000 in February 1970 at 1% per week (4627-4629).

Graifer let him have the use of a car for just the bank payments because he could not afford the regular leasing costs. He was only able to pay even this sum irregularly and one day Graifer told him to bring the car to the Empire State Building because Graifer had a customer for it. He went to the Riverboat Restaurant to meet Graifer who was there with Heller man and another man he did not know or remember. The car had been intended for Heller man but Heller man wanted a brand-new Eldorado, not a second-hand De Ville, so, after a short time, Lombardo left. He never discussed anything about taking AYSL public, did not go up to Dioguardi's office and never gave to, or got from, him \$22,500 (4626-34).^{***/}

^{*/} Defendant's Exhibit AS was the file set up to study Heller man's policies (4621-23).

^{**/} A fact admitted by Graifer (736).

^{***/} Heller man had introduced him to Dioguardi as a possible insurance client but Dioguardi had his own broker; he once went to Dioguardi's office with Heller man but waited outside in the lobby and did not meet with Dioguardi (4634-36, 4660).

He knew Vincent and Sebastian Aloï, having gone to the same school as the former's older son; when he obtained his insurance license he went to see the Aloï's and they gave him their insurance business; he also wrote the policies for John Savino's business and Pasquale Fusco's personal and family needs (4636-38).

He began to work for AYSL in the summer of 1970. He was hired as an insurance "consultant" (because he could not actually write policies in New Jersey) and went down to Florida with Graifer in connection with setting up insurance for a proposed Florida branch. Graifer also said he was going to open up a Long Island office near Lombardo's home and this appealed to Lombardo because his injured leg prevented him from doing too much driving or physical exertion. He also did some collection work for Graifer, entertained some clients, and got him some new customers. He was not put on the payroll in return for helping AYSL go public, and never discussed this with Sebastian Aloï on the trips to Florida (4639-47).

Lombardo explicitly denied loaning \$10,000 to Hellerman or receiving this sum from Vincent Aloï in connection with AYSL (4638, 4647).

He might have been in Hellerman's office on the date of the AYSL closing, but he had gone there because Hellerman had said he would get a free vacation for Lombardo and Lombardo wanted to get the details; he did get brochures and the name of the person to call and did take a free vacation in the Poconos (4648-59).

Although Graifer had given him American Express and Diner's Club credit cards he never used them because he did not feel he was entitled to them; he only used the gas credit cards (4650-51).

He worked for AYSL until July or August 1971. He quit once, a few months earlier, because he found that Graifer had been shylocking one of the bookkeepers. He returned^{*/} but quit for good when it became clear Graifer was not going to open the Long Island office (4652-57).

He categorically denied any involvement in the AYSL stock fraud (4660-61).

The prosecution began its cross-examination by facetiously inquiring as to where Lombardo's knowledge of loansharking terms came from ("Shylock," "point") and asked if he was aware that loansharks used "tough" methods of collection (4661-67).^{**/}

Lombardo denied having been a loanshark "with" Sebastian Aloï and denied loaning money at usurious interest rates to anyone

^{*/} Graifer gave him a 14-karat gold putter as a gift when he returned; Graifer gave him other expensive golf gifts and a ring (4638-39, 4653-56).

^{**/} As demonstrated by testimony elicited from Hellerman (1727-29) the government was determined to portray to the jury a picture of Lombardo as a loan shark. They returned to this theme again and again during Lombardo's two-day two hundred page cross-examination until the court directed them to desist because they were prejudicing Lombardo's right to a fair trial (4888, 4891). See Point III, infra.

including Heller man, Savino, Fusco and Graifer (4668-70). He denied that he was put on the payroll of JCLD Trucking to hide the fact that he was receiving interest on a \$20,000 loan to the company; he explained that he loaned this money (compensation for his accident) to a relative who was the owner of JCLD (Thomas Petrizzo) and that "half out of pity" and because he did some work for the company he was put on the payroll (4671-74).^{*/}

The government then introduced into evidence copies of papers taken from Lombardo (Gov't. Exh. 91-96).^{**/} Counsel objected on the ground that this would constitute an attack on Lombardo's credibility

^{*/} All of the cross-examination about Lombardo's alleged loan-sharking was objected to on the ground that it constituted an attempt to prove uncharged crimes (4682-88). It was also objected to on the ground that it was the tainted product of Lombardo's prior Nassau County Grand Jury testimony which had been given under a grant of transactional immunity. The court ruled that this was a matter which could be taken up post-conviction (230-37, 4679-87, 4712-15). A post-verdict hearing on a motion for a new trial was held on April 2 and April 16, 1974. Although no decision has been rendered as of the date of the filing of this brief (May 20, 1974), remarks made during the hearing indicated that the court intended to deny relief. Because of this and because it is factually related to the other cross-examination issue, this issue will be argued in this brief (Point IV, *infra*) as though it had been denied. The necessary facts will be set forth in the Point. As was done with the jury voir dire and the trial transcript, three copies of the hearing minutes (separately docketed) have been filed with the Clerk's Office. Since the hearing court ordered that no one but the defense counsel and this Court see the Nassau County Grand Jury minutes it has not been possible to have copies made to furnish to this Court; counsel will endeavor to have Judge Knapp's copy of these minutes sent to the Court before the date of argument. Of course, as soon as a decision is rendered on the motion it too will be sent to the Court.

^{**/} These were the papers seized from Lombardo when he was arrested in 1971.

by using extrinsic evidence to show prior criminal acts (loanshark loans) which were not convictions. The government responded that they were trying to show that Lombardo's motive for entering the conspiracy was to get paid on his \$10,000 loan to Hellerman. The court agreed and overruled the objections (4682-88).

Lombardo was thereupon subjected to an extended cross-examination about these lists which consisted of the government repeatedly suggesting that different entries were notations of different loanshark loans to different persons.^{*/} Although Lombardo denied these suggestions (explaining that he did not keep a formal diary [4966], that some of these papers went back 10 years [4786], and that they contained names and telephone numbers of people who had visited him in the hospital, after his accident, prospective insurance customers, collection accounts for AYSL, and other information-- such as grocery lists [4761]) the prosecutor returned again and again to the same questions (See, e.g., re: "tips" -- 4690-93, 4752-56a, 4789, 4794, 4811, 4979, 4981, 4985-86; re: "Checko" -- 4695, 4736-37, 4770-70a, 4778-79, 4790, 4794-95, 4811; re: "Ed G." -- 4737-38, 4756-57, 4779-80, 4795-96, 4982; re: "Big Al" -- 4739-40, 4759-60, 4770, 4782-83, 4790-91, 4983-84; re: "Petrizzo" -- 4741, 4767-68, 4793-94, 4811; re: "Flip" -- 4762-63, 4780-81, 4783; re: "Jim Pancake"

^{*/} It would not be possible to condense or synopsise this cross-examination and still convey its atmosphere and effect. Accordingly, the court's attention is respectfully directed to the following pages: 4688-95, 4736-98, 4911-12.

— 4769, 4777-78, 4791; re: whether these papers showed

Lombardo was a loanshark — 4682, 4744-45, 4756, 4763, 4769, 4845, 4912).^{*/}

The prosecution also asked Lombardo if he had ever used the name "Ralph Servino" thereby exposing to the jury the existence of the meritricious relationship between Lombardo and Joan Bliss Servino (4696,^{**/} 4866, 4907-10, 4912-15).

Furthermore, and under the guise of cross-examination and "refreshing the witness' recollection," the prosecutor repeated much of the incriminating testimony against Lombardo (see, e.g., 4810, 4839-40, 4849-50, 4855-60, 4867-72, 4870-77) until the court finally directed him to stop (4889).

On redirect Lombardo explained that some of the papers taken from him in 1971 were in Graifer's handwriting (4955) and that there were many other papers taken from him which were not incriminating (see Defendant's Exhibits AX-AZ) and had been attached to the papers

^{*/} The court admonished the government repeatedly to move on to other areas and stop repeating questions (See, e.g., 4771, 4777, 4778, 4790, 4791, 4798, 4904, 4906).

The prosecutor also asked whether Lombardo had \$1,600 on him when the papers were taken from him (to support the government's loanshark theory) though it knew this was Graifer's money and had been returned to him (4820).

^{**/} The prosecutor put this highly prejudicial evidence before the jury when he abruptly dropped the subject of his prior cross-examination upon being informed he had only five more minutes until the week-end break (4695-96).

the government had put into evidence (4955) (but which had not been introduced by the government). He also pointed out that GX91A (a blow-up of GX91)^{*/} had the word "liability" next to the name "Sal P." and that Defendant's Exhibit BN (which had also been seized from him) contained the notations "W.C." for Workmen's Compensation and "burg" for burglary insurance (4972, 4987).

CHARGE

The court's charge (5459-5502) is discussed in detail in Points II and III of the Brief for Appellant Dioguardi, and the court's attention is respectfully directed thereto.

VERDICT

The jury found Lombardo guilty of the conspiracy count (count I), one wire fraud count (count 9) and the count involving the fraudulent prospectus (count 18) (5593-94) and acquitted him on all other counts (5595).

SENTENCE

Lombardo received two concurrent five year prison terms on counts I and 18 and five years probation on count 9 (Mins. 2/5/74, at 25-26).

^{*/} One of the alleged loanshark lists.

POINT I

THERE WAS INSUFFICIENT EVIDENCE TO
ESTABLISH BEYOND A REASONABLE DOUBT
THAT APPELLANT LOMBARDO WAS A
KNOWING MEMBER OF A CONSPIRACY TO
VIOLATE THE SECURITIES LAWS OF THE
UNITED STATES OR THAT HE HAD THE
SPECIFIC REQUISITE INTENT TO BE
CONVICTED OF HAVING VIOLATED EITHER
THE WIRE FRAUD OR PROSPECTUS
COUNTS OF THE INDICTMENT

(a) The Conspiracy Count^{*/}

Accepting the government's proof in its most favorable light, the most that was established against appellant Lombardo was that he knew that \$45,000 was being paid "under the table," and that this payment had some connection with AYSL "going public." There is absolutely no proof, however, that appellant Lombardo knew that this was a violation of federal law at all, let alone a violation of the specific federal law set forth in the conspiracy count. Accordingly, he was not a "knowing" member of the conspiracy charged in count 1 and his conviction thereon must be reversed.

Count 1 charged a conspiracy in violation of the general statute (18 U.S.C. Section 371)^{**/} in that there was a conspiracy to "unlawfully, wilfully and knowingly . . . commit certain violations of federal law,

^{*/} The arguments set forth herein should be read in conjunction with the insufficiency claims raised in Point I of Appellant Alois's brief and the insufficiency and charge claims raised by Point II of Appellant Dioguardi's brief.

^{**/} Plus aiding and abetting, 18 U.S. C. Section 2.

to wit, violations of Title 15, United States Code, Sections 77q(a), 77s(a), 77x and 17 C.F.R. Section 230.256 and Section 240.10b-5. "Section 77q(a) makes it unlawful to use any instrument of interstate commerce to employ any scheme to defraud, to make any untrue statements or omissions of material fact, or to otherwise defraud anyone, in a sale or purchase of stock; 17 C.F.R. Section 240.10b-5 repeats this verbatim. Section 77(s) says the SEC has power to adopt rules and regulations governing "registration statements and prospectuses," 17 C.F.R. 230.256 sets forth those rules for a Registration A Exemption of the type involved here. Section 77(x) makes "wilful" violation of any other section of Title 15, subchapter 77, or the rules and regulations promulgated thereunder, a crime.

To be guilty of count 1, therefore, it had to be shown that appellant Lombardo conspired, or aided in a conspiracy, to defraud the public in re: AYSL's going public either by wire fraud or fraud in the prospectus. Neither was proven.

The court specifically and properly charged the jury that one could be guilty of conspiracy or aiding and abetting only if one knew of the "particular unlawful purpose" of the conspiracy (5491-92). This was a perfectly proper charge because

a mere willing participation in acts with alleged co-conspirators, knowing in a general way that their intent was to break the law, is insufficient to establish a conspiracy (citing).

[United States v. Purin, 486 F.2d 1363, 1369 (2d Cir., 1973)]

Appellant Lombardo may have known that paying \$45,000 "under

the table" may have been illegal, and he may have even surmised that it might violate the federal law in some way, but there is no proof that he knew it violated either the federal securities laws in general or those set forth in count 1.

There is no proof that appellant Lombardo knew either the general outline or the specific details of Hellerman's scheme to sell the AYSL stock: they were not discussed in front of appellant Lombardo at the Riverboat Restaurant (1588-89), at Dio's office (1761, 1806, 1828) or at the closing (where he was outside when the back-dating of the buy and sell confirmations was explained) (1859). Accordingly, none of his actions, including the alleged telephone call to Sebastian Aloï (count 9) were in knowing furtherance of a fraudulent securities scheme. ^{*/}

Furthermore, there was proof that appellant Lombardo thought there was nothing illegal in the plan to take AYSL public. As noted, he was not present at the closing when Hellerman told the others that no further extensions were possible and that the closing was therefore illegal and the confirmations had to be back-dated.

Up to and including that time both Gerald Miller (Tech-Ec's attorney) and Graifer believed that further extensions were possible

^{*/} Graifer himself said he had not become aware of the means Hellerman was going to use to rig the stock until a few weeks after the Riverboat meeting (683). It was only when he went before the SEC to testify that he learned how the public was being swindled (688).

(542, 889) and they may well have told this to appellant Lombardo.^{*/}
That this did happen is supported by Hellerman's testimony that at a later date Dioguardi told him that appellant Lombardo had told him that Miller had said the offering was illegal and all of the money paid for the stock might have to be returned (1907-08). If, as this implies, appellant Lombardo, never having been privy to discussions of Hellerman's plans, had no reason to believe the plan to take AYSL public was a violation of federal law, he was not a member of the conspiracy charged in count 1.

Nor was there sufficient knowledge of the alleged false statements and omissions in the prospectus to constitute knowledge of the conspiracy.^{**/} Although Hellerman testified that appellant Lombardo gave him a copy of the prospectus (1752) there was no proof appellant Lombardo ever read it^{***/} or, in view of his lack of knowledge of the details of AYSL going public or the scheme to defraud, that he was

^{*/} Graifer also testified that he originally believed Hellerman had a small number of purchasers for the entire offering (863), and, even when Hellerman changed the plan to a purchase by a large number of persons Graifer still believed there was no fraud--it was only at the closing that he found out the names had been drawn at random from the telephone book (897-98). Nelson testified that Graifer had told him that he (Graifer) already had purchasers for the offering when he came to Tech-Ec (2704). Under either Graifer's or Nelson's testimony appellant Lombardo could well have believed there was nothing illegal--in a federal securities manner--in the deal.

^{**/} Either as a conspirator or as an aider and abettor, cf., United States v. Stewart, 451 F.2d 1203, 1207 (2d Cir., 1971); United States v. Gallishaw, 428 F.2d 760, 763 (2d Cir., 1970).

^{***/} Hellerman said he had not read it (2246-47) and Graifer said he had read it but was not concerned about its contents (938).

aware of the materiality of the alleged omissions or that there were any omissions at all.

Graifer testified that the prospectus, when prepared, was correct (677) or, at least, that he was unaware of any falsities the first time he read it (878-83). Andrew Nelson testified that many amendments were made before the final offering circular was printed up and filed (2711). Securities law is a highly specialized area and knowledge of its intricacies should not be presumed.^{*/} Therefore, it should not be presumed, especially in the light of the foregoing testimony, that appellant Lombardo was aware of any of the alleged errors or omissions in the prospectus, in particular that the \$45,000 payment should have been referred to therein.

This court's decision in United States v. Gallishaw, 428 F.2d 760 (2d Cir., 1970) demonstrates how important it is that the government demonstrate knowledge of the specific offense an accused is alleged to have conspired to violate. In that case, Gallishaw was charged with conspiracy to rob a bank in violation of 18 U.S.C. section 371. During jury deliberations they asked if in order to find Gallishaw guilty they had to find that he knew that the gun he gave to one of his alleged co-conspirators would be used in a specific bank robbery; the court replied that Gallishaw only had to know that the gun would be used to violate "some" law. Reversal was called for with the following statement:

^{*/}Cf. Jacobs, What is a Misleading Statement or Omission Under Rule 10b-5?, 42 Ford.L.Rev. 243 (1973).

In *Ingram v. United States*, 360 U.S. 672, 678, 79 S.Ct. 1314, 1319, 3 L.Ed.2d 1503 (1959), the Supreme Court stated:

"[C]onspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." [Footnote omitted.]

On this record, to convict Gallishaw for the substantive crime of aiding and abetting a violation of 18 U.S.C. Section 2113(a), the Government would have had to show that he knew that a bank was to be robbed. To convict him of conspiracy, at the very least no less was required. Cf. *Nelson v. United States*, 415 F.2d 483 (5th Cir., 1969), cert. denied, 396 U.S. 1060, 90 S.Ct. 751, 24 L.Ed.2d 754 (1970); *Lubin v. United States*, 313 F.2d 419 (9th Cir., 1963); *Twitchell v. United States*, 313 F.2d 425 (9th Cir., 1963); *United States v. Buffalino*, 285 F.2d 408, 415-16 (2d Cir., 1960). See generally Wechsler, Jones & Korn, *Treatment of Inchoate Crimes in the Model Penal Code*, 61 Colum. L. Rev. 958, 972-75, 988-93 (1961). Therefore, the charge here was fatally defective. To be sure, as the Court pointed out in *Ingram*, a conspiracy may have multiple objectives and one who joins it commits a federal offense if "even a minor one" of these is to do an act which perpetrates a federal crime. 360 U.S. at 679-80, 79 S.Ct. 1314. But the jury must be told that the alleged conspirator must have knowledge of that "minor" objective in order to agree to it, *Id.*, see *United States v. Crimmins*, 123 F.2d 271, 273 (2d Cir., 1941), although, of course, such knowledge may be inferred from the circumstances.

[*Id.* at 763; footnote omitted]

In this case, although the charge was correct, the proof did not permit the jury to find the requisite knowledge of intent to violate the specific federal criminal laws set forth in count 1, and the conviction on that charge must be reversed.

(b) The Wire Fraud Count

The only wire fraud count of which appellant Lombardo was convicted was count 9. This dealt with the alleged phone call from the cigar store on the corner of Dioguardi's office to Sebastian Aloï whereupon it was agreed that the terms of the deal were acceptable to all parties.

Appellant Lombardo contends that his conviction on this count must be set aside for two reasons: (1) that since the conspiracy was not proven the giving of the Pinkerton instructions (5500-02) requires a reversal on this substantive count (United States v. Cantone, 426 F.2d 902, 904-05 [2d Cir., 1970]) especially since the substantive count was referred to in the conspiracy count as a "means of the conspiracy" (73 Cr. 699 at 7) and as an overt act (73 Cr. 699 at 12). United States v. Mapp, 476 F.2d 67, 82 (2d Cir., 1973); (2) that the use of interstate communications by two co-conspirators to "OK" a fraud is not a violation of 18 U.S.C. Section 1343 because that statute requires that one of the parties to the call be a person upon whom the fraud is being practiced.*

(c) The Fraudulent Prospectus Count

Count 18 charged all the appellants with use of a fraudulent offering circular. Appellant Lombardo's conviction on this count must be set aside for five reasons: because a Pinkerton charge was given

* The more detailed arguments in support of these contentions, set forth in Point III of the Brief for Appellant Dioguardi, are specifically incorporated herein by reference.

(5494-95) but the conspiracy was not proven; (2) because the court erroneously charged that "issuance" of the prospectus was the crime charged (5495); (3) because the court failed to define the terms "material omission" although they were crucial to a determination of whether the statutes (15 U.S.C. section 77(s) and 17 C.F.R. 240.10b-5) were violated; (4) because there was no showing appellant Lombardo knew the prospectus was false (see part [a] of this Point, supra); and (5) because there was no proof that the prospectus did contain any material omissions or played any part in the conspiracy, since it never left Hellerman's office (2783) and was neither relied upon nor of any concern to nor ever received by any of the purchasers of AYSL stock (3546, 3570, 3577, 3586).^{#/}

^{#/} The more detailed contentions in support of these arguments, set forth in Point II of the Brief for Appellant Aloï and Point II of the Brief for Appellant Dioguardi, are expressly incorporated herein.

POINT II

THE REFUSAL OF THE TRIAL COURT
TO PERMIT DEFENSE COUNSEL TO
INTRODUCE EVIDENCE OF HELLERMAN'S
OWNERSHIP OF, AND INTEREST IN,
SEVERAL SAFE DEPOSIT BOXES
CONSTITUTED REVERSIBLE ERROR
WHERE THAT EVIDENCE WAS RELEVANT
TO SHOW HELLERMAN'S BIAS AND FAVOR.

Following a series of questions about whether he had secreted the proceeds of any of his stock fraud in Swiss banks, Heller man was questioned about the existence of safe deposit boxes in his name or that of a nominee; he denied ownership of any such box and denied secreting any stock fraud proceeds therein (2045-47).

On the defendant's case an official of the First Israel Bank testified that Hellerman had leased a safe deposit box for one year on June 24, 1970 and renewed the lease on September 23, 1971. The access records (which were incomplete [3683]) showed visits on June 24 and June 27, 1970. Jeopardy assessments had been made on November 5, 1971 and December 10, 1971 and the box had been sealed on July 25, 1972 (3670-85).

The court ruled that this testimony was irrelevant because defense counsel's cross-examination of Hellerman about boxes had been directed only to the time of Hellerman's sentence (December 1972) and since at that time the box was inaccessible to him (because sealed) his denial was not contradicted by this testimony.

Defense counsel insisted that his cross-examination had not been so confined^{*/}; he contended that he was trying to demonstrate "bias and favor" in that the government did nothing about this box for almost two years after the "deal" with Morvillo to pay restitution. Furthermore, there were two other boxes and both of these were accessible to Hellerman even on the date of his sentence. The court ordered all three boxes opened and when no money was found refused to permit further testimony on the issue on the ground it was collateral. This was error.

It is hornbook law that the existence of bias or favor or corruption on the part of a witness is never collateral; accordingly, even extrinsic evidence is admissible to show it. 3A Wigmore, Evidence Section 948 (at pp. 783-84) and Section 1005 (at pp. 968-69) (Chadbourn rev. 1970). See, e.g., United States v. Briggs, 457 F.2d 908, 910-11 (2d Cir., 1972); United States v. Blackwood, 456 F.2d 526, 530 (2d Cir., 1972).

The government's entire case depended upon the jury believing Hellerman's testimony and, accordingly, any facts could be shown

^{*/} Because defense counsel inserted two questions about restitution in between his questions about Swiss bank accounts and safe deposit boxes the court ruled that the questions about the safe deposit boxes were directed to the time the restitution had to begin to be made, i.e., the date of sentence. A reading of the questions (2045-47) would seem to indicate the court was wrong and defense counsel's contention that he was working from a list of subjects supports his claim that he had not shifted to another topic; in any event, it seems that this was preeminently an issue for the jury to resolve (see colloquy at 3891-96). The net effect of the court's ruling was to advise the jury that the First Israel Bank official's testimony was irrelevant.

"from which it might be concluded that the witness favors the party for whom he has testified . . . [or] 'shaded his testimony for the purpose of helping to establish one side of a cause only.'" United States v. Lester, 248 F.2d 329, 334 (2d Cir., 1957). Or, as this Court stated in the recent case of United States v. Blackwood, 456 F.2d 526, 530 (2d Cir., 1972):

A defendant's major weapon when faced with the inculpatory testimony of an accusing witness often is to discredit such testimony by proof of bias or motive to falsify.

Hellerman had made a deal with the government which included a promise to pay \$100,000 restitution when able. If it could be argued to the jury that Hellerman had three safe deposit boxes at the time he made this deal, that the government knew or should have known of them, and that only one was ever proceeded against by the government (and that almost twenty months after the deal was made),^{*/} this would go far to support the contention that Hellerman was being favored by the government and was probably repaying them with his testimony.

In United States v. Wolfson, 437 F.2d 862 (2d Cir., 1970) one Rittmaster gave crucial testimony against the defendants, who offered to prove that after the witness gave this testimony the SEC gave him a

^{*/} Murray Winter said he had told the government that he had heard Hellerman had a box at First Israel because "they had been anxious to get ahold of what's in it" (3313-14). Despite this "anxiety" the jeopardy assessments were not made until a year after the deal and the lien was not placed on the box for another eight months. Schoengold also believed he'd told an Assistant United States Attorney about this box (3053).

previously-refused "no action" letter. The refusal of the trial court to permit this testimony was held reversible error:

In this interchange of correspondence, defense counsel would have had the material from which they could have argued to the jury that this was Rittmaster's reward and was his motive for his testimony against the defendants. Although the [lower] court said that the case 'just abounds with opportunities for attacking the credibility of this witness,' there had been no opportunity so directly to challenge his motives for giving his specific . . . trial testimony.^{*/} . . . The Duncan Parking Meter case established Rittmaster's willingness to commit perjury; the excluded correspondence would have established a motive to continue that practice in this case.

[Id. at 874]

In this case, admission of the evidence would have given support to the argument that Hellerman's testimony constituted repayment for the favor the government did him by not impeding his access to the boxes and their contents for a long time after the restitution promise had been made.^{**/}

^{*/} Cf. United States v. Pacelli, 491 F.2d 1108, 1119 (2d Cir., 1974): "Although appellant's counsel possessed an abundance of impeaching material which he exploited at trial . . . [he] would probably have sought to make this letter [from the main government witness to Morvillo, which was not given to defense counsel] the 'capstone' of his attack on Lipsky's credibility."

^{**/} It is true that the boxes did not yield any cash, but they did reveal that large sums of money had once been contained therein. The First Israel Box contained an envelope reading "22,000-five and 27,000-five, \$50,000" (4450); the Chemical Bank box yielded a "fat" rubber band and a slip of paper with "5" on it; and the Bankers Trust letter had a \$2,000 money wrapper, dated 1/25/71 on which was written "51,000" and a second \$2,000 wrapper stamped 7/27/70 and "10,000" (5055-59). The inferences to be drawn from this would have had a substantial effect on a jury that twice asked for safe deposit box testimony (5526, 5540).

In United States v. Padgent, 432 F.2d 701 (2d Cir., 1970) the main government witness had pled guilty but denied making a deal with the government. Defense counsel sought to question her about not being prosecuted for jumping bail so as to adduce facts from which the jury "could have concluded that Miss Daniels was rewarded for her testimony and therefore her testimony was false and unbelievable." The refusal of the trial court to permit this interrogation led to reversal in the following language:

An accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect, for such a witness may well have an important personal stake in the outcome of the trial.

[Id. at 704]

The Wolfson decision also noted that exclusion of the Rittmaster-SEC correspondence "deprived [the defense] of an opportunity to answer the government's argument that Rittmaster actually suffered a financial detriment by surrendering his \$100,000 . . . salary, by arguing that his testimony had enabled him to receive \$500,000." 437 F.2d at 874. In this case, Hellerman's testimony that he was paying vigorish on a usurious loan (from Lombardo) and that he needed "front money" to do the AYSL deal (also conveniently furnished by Lombardo) was made more believable by his claim that he was "broke" during this period of time. The introduction of the evidence of the existence of these boxes and their contents (and the inferences to be drawn therefrom) would have removed much of the force of this testimony which seriously implicated Lombardo.

Evidence of facts showing "proof of bias or motive to falsify . . . is never collateral (citing) for if believed it colors every bit of testimony given by the witness whose motives are bared. . . ." United States v. Blackwood, *supra*, 456 F.2d at 530 (Emphasis added). If the safe deposit box testimony had been admitted "and if such testimony [and the inferences therefrom were] believed by the jury, reasonable doubt as to the veracity of other prosecution witnesses could certainly have arisen."^{*/} United States v. Haggett, 438 F.2d 396, 399 (2d Cir., 1971) (emphasis added).

In United States v. Barash, 365 F.2d 395 (2d Cir., 1966) the main government witness was one Clyne. The lower court's refusal to admit certain evidence "pertinent on the score of bias" led to reversal with this statement:

For the defense to establish that Clyne had lied about [one matter] would have an importance transcending that particular issue; the jury might well have concluded that, having lied on one subject, he had lied on all.

[Id. at 401]

No doubt the government will argue that since Heller man had been told he would be prosecuted for perjury if he lied he would not do so. It must be remembered, however, that this was part of the same "deal" as the restitution promise; therefore, a showing that the

^{*/} Particularly where defense counsel suggested throughout the trial and argued in summation that the prosecution witnesses had concocted their testimony together.

government had not enforced the restitution portion of the deal would permit defense counsel to strenuously assert that Hellerman could lie in the belief that the "tell-the-truth-or-be-prosecuted-for-perjury" portion of the deal would also not be enforced.^{*/} At the least, the evidence of these boxes, directly contradicting Hellerman's denials would have seriously undercut the government's extensive reliance on this portion of the deal to support Hellerman's testimony (see prosecution summation at 5390-96).^{**/}

It is true that a small amount of evidence concerning Hellerman's ownership of a safe deposit box did come into the record before questioning of the First Israel Bank official was terminated (3668-87). However, no evidence of the other two boxes was ever put before the jury (all of the proceedings re: these boxes having been conducted in the absence of the jury [4299-4325]).

In United States v. Barash, supra, the lower court had excluded certain tapes which defense counsel claimed would show bias.

^{*/} The judge expressly charged the jury that Hellerman's "perception" of his deal with the government "may well be vital to your appraisal of the reliability of Hellerman's testimony" (5470).

^{**/} The existence, in such a deal, of an understanding that a government witness will be dealt with more leniently than the strict terms of such a deal would indicate, and more leniently than his testimony at trial would indicate, is not unusual. The New York Times of April 25, 1974 carried a report of a case in which the government's main witness had a deal for the prosecutor to recommmend leniency but had been told privately by the prosecutor that he could guarantee the witness would not go jail (p. 51, col. 1). Proof that a witness is being favored beyond the deal he testified to would certainly undercut his veracity.

However, because the prosecutor did not object until a series of questions about the contents of the tapes had already been asked and answered "defense counsel was able to get a large amount of the recordings before the jury - enough to include the point in his summation." Id. at 401. This Court ruled that the conviction still had to be reversed, particularly because "the judge's remarks . . . in effect instructed the jury to disregard the impeaching evidence that had already been elicited." Ibid. This is precisely what happened here when the trial court explicitly told the jury that this testimony "isn't relevant to this case" (3672). Cf. United States v. Pacelli, supra, 491 F.2d at 1119 to the effect that exclusion of evidence relevant to impeachment of crucial government witness will not be treated as harmless error.

Proof that the excluded evidence was not only not collateral but was crucial to the jury's determination of guilt or innocence is dramatically present on this record, for the jury twice requested testimony and documents relevant to Hellerman's ownership of safe deposit boxes; first the jury requested Hellerman's testimony in which he denied ownership of any such boxes (5526) and then, obviously not satisfied, they asked for the documentary records of the First Israel box (5540). However, the force of the contradiction between his testimony and the documents was blunted by the court's ruling (based on its belief that there was no contradiction) that all of this was irrelevant. Had the jury been given evidence clearly estab-

lishing that Hellerman had lied, had had safety deposit boxes containing objects indicating the boxes had held large sums of money, and that the government had not taken adequate steps to insure that Hellerman lived up to his agreement, the jury's belief in, and use of, Hellerman's testimony would have been significantly changed as would have been the few guilty verdicts that were returned.*

In sum, the safe deposit box evidence was not collateral but was crucial to the issues in this case and the action of the trial court in excluding it was reversible error.

* In United States v. Padgent, supra, the fact that the jury acquitted the defendant on one count showed that they had doubts about a government witness and was a clear indication that the exclusion of impeaching evidence affected their verdict. Here, the jury acquitted on numerous charges after even the limited impeaching testimony was reread.

POINT III

**THE INTRODUCTION AGAINST LOMBARDO
OF EVIDENCE OF UNCHARGED CRIMES,
AND THE LENGTHY CROSS-EXAMINATION ON
THIS AND OTHER IRRELEVANT AND HIGHLY
PREJUDICIAL SUBJECTS DEPRIVED HIM
OF A FAIR TRIAL.**

Count 38 of the instant indictment (charging Lombardo with an extortionate \$10,000 loan to Hellerman) had been severed prior to trial on the grounds of misjoinder and probable jury confusion.^{*/} Despite this fact the prosecution was permitted to elicit direct testimony about this matter from Hellerman and was permitted to cross-examine Lombardo about this matter and other alleged loan-shark loans. This, combined with other improper cross-examination, deprived Lombardo of a fair trial.^{**/}

(a) Hellerman's testimony

Over strenuous objection, the prosecution was permitted to elicit from Hellerman testimony that Lombardo lent him \$10,000 at a usurious rate of interest. This testimony was admitted on the theory that it established both Hellerman's and Lombardo's motives

^{*/} Count 38 of 73 Cr. 699 and the trial court's original decision and decision on reargument severing this count are set forth in Lombardo's Supplemental Appendix.

^{**/} In Point IV it will be contended that Lombardo is entitled to a new trial because the information used to cross-examine him was derived from immunized Grand Jury testimony.

for joining the AYSL conspiracy, i.e., the former wanted money to be able to repay the loan and the latter wanted the former to be able to repay it (1727-28). This was error for several reasons.^{*/}

Firstly, the court had severed the count charging Lombardo with this loan and that severance takes the entire matter out of the case. Since severance will not be granted where, despite it, evidence of the severed matter would still be admissible (see, e.g., United States v. Steel, 38 F.R.D. 421, 424 [S.D.N.Y., 1965]) the fact that severance was granted here shows that evidence of the loansharking is not admissible.^{**/}

^{*/} Even if the existence of the loan was admissible the further testimony about it was totally irrelevant and highly prejudicial. Hellerman was permitted to testify to the circumstances surrounding the making of the loan (John Dioguardi had to guarantee the loan to Sebastian Aloï [1731-32]) and the circumstances surrounding the reduction of the interest payments (another Dioguardi-Sebastian Aloï "sit-down" [1733]) (This type of testimony was precisely what the prosecutor wanted in order to demonstrate the role of the "organized crime families" in the AYSL fraud. See Point IV, infra). Hellerman also used the loan as the device for painting the picture of Lombardo bringing the AYSL deal to him on his Saturday morning visit to collect his interest (1749-53). None of this testimony was relevant even on the government's theory of proving motive and was simply prejudicial overkill. Of itself, it calls for reversal. United States v. Tomaiolo, 249 F.2d 683, 687 (2d Cir., 1957).

^{**/} It was true that the trial court said that it had ruled that although the count was severed the evidence could come in (1728); however, a reading of the decisions on severance does not support this statement (see Supplemental Appendix). In any event, the reasoning behind the severance, i.e., to prevent the jury's attention from being diverted from the stock fraud conspiracy to "a separate event admittedly outside the alleged conspiracy [which] would in this case be confusing" (Memo decision of 10/17/73 at 2), applies with as much force whether the evidence is being considered by the jury on one count (the conspiracy) or two (the conspiracy and the extortionate loan). United States v. De Cicco, 435 F.2d 478, 483 (2d Cir., [cont'd next page]

Secondly, even if not inadmissible for the foregoing reason it should have been excluded because irrelevant to any issue in the case.

The loanshark testimony was offered re: Hellerman's and Lombardo's motives for joining the conspiracy but, as the trial court correctly charged the jury, ones "motives for doing so are immaterial" (5491).^{*/}

Moreover, the testimony of the prosecution's own witnesses made it clear that repayment of the loan had nothing to do with either Hellerman's or Lombardo's entry into the conspiracy. Graifer testified that when Lombardo took him to see Sebastian Aloï it was Aloï who first mentioned Hellerman's name (after another name had been rejected) (475). Hellerman's testimony about his first meeting with Lombardo is completely barren of any reference to the loan (1757-58). There was no testimony that Lombardo made repayment of the loan a part of the changes in terms of the deal and, in fact, Hellerman said Lombardo said that repayment was being forced upon him and that if

1970); United States v. Sweeney, 262 F.2d 272, 277 (3d Cir., 1959). It is interesting to note that the trial judge said he had discussed his decision to sever with his "colleagues" and they would have denied it (1928). Perhaps this led him to the inconsistent position he took during the trial.

^{*/} Furthermore, since Hellerman had previously pled guilty, his motive was of absolutely no relevance. Cf. Cooper v. United States, 232 F. 81, 85 (2d Cir., 1916).

Hellerman needed the money he could keep it (1867-74).^{*/}

Accordingly, even if evidence of motive was admissible the loan testimony was irrelevant to establish it and it violated this Court's rule

that evidence of similar acts, including other crimes, is [only] admissible when it is substantially relevant for a purpose other than merely to show defendant's criminal character or disposition.

[United States v. Deaton, 381 F.2d 114, 117 (2d Cir., 1967)]

Thirdly, it is obvious from the manner in which the loanshark evidence was brought out, and from the extensive elicitation of the facts surrounding its making and the changing of its terms, that the prosecution was using this testimony to attempt to portray Lombardo as a vicious Shylock.^{**/}

The government brought their evidence out "in its main case on an issue not yet [and, in this case, not ever] pressed by the defendant." United States v. Kaufman, 453 F.2d 306, 311 (2d Cir., 1971). This tactic was condemned in United States v. Byrd, 352 F.2d 570, 575 (2d Cir., 1965) in the following language:

^{*/} Graifer and Hellerman both testified that Lombardo was doing the AYSL deal to be able to show legitimate income and to be able to switch cars (436, 482, 1754) and the prosecutor adverted to this as proof of motive (1755-56). Hellerman testified explicitly that he was doing the AYSL deal to pay off a debt to Louis Ostrer and Hickey Di Lorenzo (1761), not Lombardo.

^{**/} This purpose was proven beyond any doubt by the prosecution's cross-examination of Lombardo (see [b], infra). The prosecutor also returned to this theme in his arguments for Lombardo's remand, sentence and denial of bail pending appeal.

[T]he scope of discretion does not include every offer of a prior similar offense which may contribute something to a showing of intent on the Government's main case. Where the prejudice is substantial and the probative value, through the nature of the evidence or the lack of any real necessity for it is slight, its admission at that stage may be held to be an abuse of discretion.

The evidence of loansharking was not evidence of a "similar" act to the securities laws violations and this indicates it was not even offered re: motive. See, e.g., United States v. Beno, 324 F.2d 582, 587 (2d Cir., 1963); United States v. Provoo, 215 F.2d 531, 534 (2d Cir., 1954).^{*/} It was highly inflammatory. Contrast United States v. Kaufman, supra (evidence of claiming improper deduction on income tax "is not the sort of misconduct that ordinarily arouses the irrational passions of the jury"). It was emphasized by the government both in its cross-examination of Lombardo and in its summation. Contrast United States v. Kaufman, supra ("nor did the government over-emphasize the defendant's prior misdeed"). All of these factors tip the balance against admissibility.

Lombardo's defense, as demonstrated by cross-examination of government witnesses and by his testimony on the stand, was denial of any of the acts charged, not admission with an attempt at an innocent explanation. Since there was no issue of motive, knowledge, intent or

^{*/} Evidence of similar acts may tend to establish intent or motive, etc., but evidence of dissimilar acts tends usually to establish that the perpetrator is simply a bad man. This is, of course, impermissible. Ibid.

the like and since if the jury believed Hellerman's other testimony Lombardo was clearly guilty, the only purpose served by this evidence was to convey to the jury the impression of Lombardo as a bad man. Cf. United States v. De Cicco, supra, 435 F.2d at 484. This was totally improper and requires reversal and a new trial. United States v. Byrd, supra.

(b) Lombardo's cross-examination^{*/}

The first portion of the government's cross-examination of Lombardo consisted of attempts to rebut his denials of loansharking through the use of extrinsic evidence. This constitutes reversible error.^{**/}

^{*/} If the admission on the government's case of the evidence about Lombardo's alleged loansharking caused Lombardo to take the witness stand in an attempted rebuttal, then if Hellerman's testimony was not properly admitted Lombardo would be entitled to a new trial on the ground that he had been forced to waive his privilege against self-incrimination. United States v. Franklin, 471 F.2d 1299, 1302-03 (5th Cir., 1973); United States v. Sager, 49 F.2d 725, 729-30 (2d Cir., 1931) ("[T]he introduction of . . . irrelevant testimony forced [defendant] into a position where he was compelled to explain collateral matters with which he was not charged. It reflected to his discredit, and was used by the prosecutor to his disadvantage in his summation"). Similarly, here the prosecutor in summation branded Lombardo a perjurer because of his answers on cross-examination (5377-88) and the court agreed that Lombardo had been shown to have lied (5616-17). "It can only be likely that the jury considered these attempted explanations as confirmation rather than obliteration of the [improperly] admitted evidence." Wilcox v. United States, 387 F.2d 60, 63 (5th Cir., 1957).

^{**/} All of the arguments against the admission of Hellerman's testimony about the loan (with the obvious exception of the argument that it should not have been permitted on the government's main case) apply with greater force to the cross-examination in the same subject.

As was established in (a) above, loansharking was not relevant to any issue in this trial but was completely collateral; therefore, the prosecutor was bound by Lombardo's denials that he was a loanshark and it was reversible error to "produce independent evidence to show the falsity of such answer." United States v. Masino, 275 F.2d 129, 133 (2d Cir., 1960).

It is hornbook law that "Particular acts of misconduct are not provable by extrinsic testimony to impeach moral character (citing): they are therefore also not provable merely in contradiction of the witness' statements on the stand. . . ." 3A Wigmore on Evidence, Section 1005 at p. 966 (Chadbourn rev. 1970). On the basis of this, the prosecutor's use of the lists seized from Lombardo in 1971 was objected to (4683-84) and the overruling of this objection constitutes reversible error. United States v. Lambert, 463 F.2d 552, 557 (7th Cir., 1972); United States v. Beno, 324 F.2d 582, 587 (2d Cir., 1963); United States v. Masino, supra; United States v. Sweeney, 262 F.2d 272, 277 (3d Cir., 1959); United States v. Tomailolo, 249 F.2d 683, 687 (2d Cir., 1957); People v. Schwartzman, 24 N.Y.2d 241, 245 (1969) ("The general rule is that a cross-examiner cannot contradict a witness' answers concerning collateral matters by producing extrinsic evidence for the sole purpose of impeaching credibility").

As was said by the court in the Sweeney case:

The purpose of the rule cutting off
[extrinsic] testimony on this type of cross-

examination is to avoid a confusion of
issues. . . .

[262 F.2d at 277]^{*/}

The confusion of issues raised by the introduction of the lists is clear: it was never clearly established that all of the papers used to cross-examine Lombardo were written by him; it was never clearly established what they read or what they referred to; and it was not clear that they were sufficiently closely related in time to the events at trial to be probative at all. The indefiniteness or insubstantiality of extrinsic evidence can render its admission reversible error even when otherwise admissible. See, e.g., United States v. Ambrose, 483 F.2d 742, 750 (6th Cir., 1973).

Even if the attempts to establish Lombardo's commission of prior criminal acts did not violate the rule against extrinsic evidence they still should have been forbidden because of the "prejudice to the defendant." United States v. Sweeney, supra, 262 F.2d at 277.

It is . . . easy to slip from the trial of
a man for a particular offense to the trial
of his character generally.

[Ibid.]

An examination of several cases where the introduction of this evidence caused this to happen and required a reversal will demonstrate that the same result is required here.

In United States v. Franklin, 471 F.2d 1299 (5th Cir., 1973) the defendant, charged with knowing possession of goods stolen from

^{*/} Precisely the reason the court had severed the extortion count.

interstate commerce, admitted possession but denied knowledge that the goods were stolen. He was cross-examined about an earlier "involvement" with a truckload of stolen lamps, allegedly on the issue of knowledge. This was held to be error on the ground that credibility cannot be impeached by showing specific acts of misconduct which did not result in convictions (citing United States v. Beno, 324 F.2d 582 [2d Cir., 1963]).

In United States v. De Cicco, 435 F.2d 478 (2d Cir., 1970) the defendant was charged with conspiracy to transport stolen paintings in interstate commerce and the government introduced testimony about the defendant's involvement in a prior stolen art deal on the issue of intent; conviction was reversed.

[T]he prejudice engendered by the admission into evidence of the prior acts of misconduct . . . far outweighed its legitimate probative worth, and . . . therefore it was an abuse of discretion for the trial court to allow its admission. . . . 'It is inadmissible because it unduly confuses the decision of the issues on which the case must finally turn, and makes it likely that the jury may substitute the general moral obliquity of the accused.'

[Id. at 483]

In United States v. Beno, 324 F.2d 582 (2d Cir., 1963) the defendant, an IRS agent accused of soliciting gifts, admitted receipt of the objects but maintained that he had always intended to pay for them. He was cross-examined about various minor improper acts (e.g., traffic convictions) some of which he admitted and some of which he denied. A reversal was required because:

By attempting to show that Beno was the sort of man likely to be the perpetrator of crime, the prosecution denied him a fair opportunity to defend against the particular crime charged, for this sort of evidence weighs too heavily with the jury and makes impossible the dispassionate approach necessary if justice is to be achieved.

[Id. at 587]

In United States v. Sweeney, 262 F.2d 272 (3d Cir., 1959) the defendant, on trial for Hobbs Act violations, admitted using force or violence "on occasion," but could not recall three named individuals. Testimony as to specific acts of violence on these three men led to a reversal because although

[t]heir evidence was logically relevant to show that Sweeney lied . . . and was a person unworthy of belief . . . whether Sweeney was involved in the incidents related . . . was purely collateral to the main question of Sweeney's guilt or innocence. . . .

[Id. at 276]

The trouble in this case is that the rebuttal testimony, while tending to prove Sweeney lied, also tended to show that he was a bad man, full of violent deeds.

[Id. at 227]

In United States v. Tomaiolo, 249 F.2d 683 (2d Cir., 1957) it was held to be reversible error to bring out evidence of a bank robbery although the defendant was on trial for that crime, had admitted another bank robbery, and had a defense of alibi.

In United States v. Sager, 49 F.2d 725 (2d Cir., 1931), a reversal was called for because "indiscriminate references to previous trials, bailiffs, and bondsmen [etc.], were all collateral matters and

improperly received, and we think prejudicial to the defendant's case." Id. at 729.

Applying the teachings of these cases to the facts of this case it is clear that there must be a reversal. Even assuming that Lombardo's motive for entering the conspiracy was relevant, and that proof of a false denial of the loan to Hellerman would have been probative of that motive, the attempts to introduce evidence of scores of other crimes was so clearly prejudicial as to have outweighed any such probity and to have deprived Lombardo of a fair trial.

The length and nature of the prosecution's cross-examination about the lists makes it clear that his "obvious purpose and effect was to do more than impeach defendant's credibility - it was intended to show that he was a dangerous criminal." United States v. Tomaiolo, 249 F.2d 683, 687 (2d Cir., 1957). If the prosecutor was seeking merely to contradict Lombardo's denial of the loan to Hellerman, on the tenuous theory of motive, then his use of the lists should have been limited to that; instead, he was permitted to use the lists to question Lombardo about alleged loans to others, although those loans had no possible connection to this case. Furthermore, and despite Lombardo's denials, he was permitted to ask the same questions time and time again.*

* The trial court seemed to recognize that the cumulative effect of this cross-examination was prejudicing Lombardo but was unable or unwilling to stop it (4771, 4777, 4778, 4790, 4798, 4904, 4906).

The fact that, as the prosecutor well knew, the accusations would be, and were, denied, does not render the improper attempts harmless.

In People v. Slover, 232 N.Y. 264 (1921)^{*/} a defendant was cross-examined as to many prior criminal acts, most of which he denied. This cross-examination was held to be error in the following language:

[Q]uestions . . . may not be asked for the improper purpose of planting in the minds of the jury suspicion and distrust by insinuations that the defendant has falsely denied his guilt as to collateral matters.^{**/} Although his denials may not be contradicted by extrinsic testimony, the jury is not bound to take as true the word of any witness on such matters and the district attorney may not in fairness multiply questions as to acts of collateral misconduct when no purpose is served except to prejudice the jury. . . . A weak case thus fortified might result in a conviction on the strength of collateral matters, insinuated and not proved.

[Id. at 268-69]

In Gale v. People, 26 Mich. 157, 161 (1872) a defendant had explained or denied all of the questions about prior crimes that he had been asked on cross-examination. Reversal was still called for because:

a review of the evidence in this case suggests very forcibly that, however full may be the explanation, a list of questions which assume the

^{*/} Cited with approval in United States v. Tomaiolo, supra.

^{**/} See also United States v. Richardson, 150 F.2d 58, 64 (6th Cir., 1945)--reversible error because of "repeated questions asked . . . with the deliberate intent of inflaming the jury against the appellants."

existence of damaging facts, may be put in such a manner, and with such persistency and show of proof, as to impress a jury that there must be something wrong, even though the prisoner fully denies it, and there is no other evidence.

See also United States v. Tomaiolo, supra and United States v. Provoo, 215 F.2d 531 (2d Cir., 1954) where reversals were required although the defendant denied the acts of which he was accused.^{*/}

No doubt the government will argue that any error from the admission of this evidence was cured by the court's charge. A reading of that portion of the charge directed to this issue reveals that this is not the case.

The sum of the court's charge was:

With respect to past immoral criminal acts . . . you are likewise at liberty to consider such acts on the question of credibility, the factual accuracy of the testimony given from the witness stand, but you may not use it for any other purpose.

[5471]

First of all, the charge was wrong because this evidence was not, and could not have been, admitted on the issue of Lombardo's credibility. To paraphrase the court in United States v. Provoo, 215 F.2d 531, 535-37 (2d Cir., 1954):

No authority has been cited which suggests that loansharking indicates a propensity to disregard the obligation of an oath.

^{*/} The more prejudicial and inflammatory is the nature of the act inquired about the less will the denial be held to have cured the harm. United States v. Provoo, supra.

In United States v. Tomaiolo, supra, 249 F.2d at 689, the court held that a charge that "These alleged violations . . . may not be considered as affecting credibility" was correct but did not go far enough because it implied the evidence might be relevant for some other purpose.

Secondly, if the evidence had any relevance it was on the issue of motive, in which case the jury had to be instructed: (a) that it was not proof of guilt of the crime charged; (b) that it could only be considered on the issue of motive; and (c) that it could only be considered for that purpose after Lombardo's factual participation in the conspiracy had been established beyond a reasonable doubt. See, e.g., United States v. Stirone, 262 F.2d 571 (3d Cir., 1958), rev'd, 361 U.S. 212 (1960).

Lastly, "even if the jury had been properly instructed to disregard the . . . testimony entirely . . . this would have been insufficient to eradicate from the jurors' minds the prejudicial impact of this inflammatory testimony." United States v. Beno, 324 F.2d 582, 589 n. 5 (2d Cir., 1963); see also United States v. Sweeney, supra, 262 F.2d at 277 and United States v. De Cicco, supra, 435 F.2d at 483 (introduction of prejudicial evidence of other crimes requires reversal "though the admission of this testimony was accompanied by cautionary instructions to the jury").^{*/}

^{*/} Here, at the time of the introduction of this evidence, the court merely said, "This testimony bears only on the witness' testimony..." (4689), whatever that means. The court did say it would instruct the jury on the "significance" of his testimony (4788) but this was never done.

One last comment about the prosecutor's cross-examination of Lombardo is necessary. Not content with accusing him of scores of other crimes he sought to degrade him by exposing to the jury his extra-marital relationship with Joan Bliss Servino.^{*/} No doubt the government will claim that this was fair play because Hellerman had been questioned about his girl-friend Joan Grossman (cf. 4869); the obvious difference is that that relationship was relevant on the issue of bias and favor while Lombardo's personal life was dragged before the jury merely to humiliate him. Although these questions were "probably so meaningless as to be innocuous, it shows how far into irrelevancy the prosecutor was permitted to roam." United States v. Tomaiolo, supra, 249 F.2d at 690; see also United States v. Beno, supra, 524 F.2d at 585. Lombardo was also confronted with virtually all of the incriminating evidence against him that had been offered on the government's direct case (accompanied by the prosecutor's pounding and asking the questions in a loud and accusing voice [4682, 4881]) in such a manner that the court directed him to stop because he was making himself an unsworn witness (4755, 4889). Cf. United States v. Puco, 436 F.2d 761, 762 (2d Cir., 1971).

To paraphrase this Court's decision in United States v. Beno, supra, 324 F.2d at 585, 589:

With this, Lombardo stepped down,
having been subjected to exhaustive

^{*/} By abruptly switching the topic of his cross-examination he assured that the last bit of evidence the jury would hear before a weekend break was this juicy tidbit (4695-96).

examination on numerous collateral issues.^{*}

* * *

Looking at the record as a whole, we are unable to determine whether Lombardo was convicted of stock fraud, or of loansharking, or of any other of his prior activities which were thoroughly explored for the jury's edification.

Accordingly, Lombardo is entitled to a new trial.

^{*} Coming "at the very close of the case." United States v. Sweeney, supra, 262 F.2d at 277.

POINT IV

THE MOTION FOR A NEW TRIAL
SHOULD HAVE BEEN GRANTED

- (a) Where a State Grand Jury Witness Is Affirmatively Misled to Believe that He Was Receiving Federal Transactional Immunity, It Was a Violation of Due Process and Fundamental Fairness for the Federal Government to Indict Him for, and Elicit Testimony about, Immunized Transactions.

When Lombardo was first given immunity in the Nassau County Grand Jury, he immediately inquired as to its scope. The pertinent colloquy was as follows:

Q. I remind you, Mr. Lombardo, you're still testifying under oath and now under the grant of immunity which has been conferred upon you by the Foreman of the Grand Jury.

Do you understand that?

A. Yes, but there's one thing that isn't clear to me, sir. On this immunity, what is the scope of this, territory-wise? Is it just New York State? Nassau County? Or is this a federal--

Q. Have you asked your attorney this question?

A. Yes, but he doesn't seem to be sure, also because I don't remember when the Foreman read the scope of the immunity whether or not it covered this area.

Q. Mr. Lombardo, you are receiving and have received in connection only with your testimony full and complete immunity.

In other words, full and complete, I believe are self-explanatory. There are cases which have evolved under the law which described full and complete to mean exactly full and complete immunity.

A. Yes, I understand that.

Q. You understand that?

A. But when the Foreman read it to me he mentioned the word, "County," and "New York State," and--

Q. Well, that was, that was--

A. --pertaining to--

Q. --pertaining to some of the crimes.

A. Oh, I understand.

Q. You see. In answering your questions only in testifying to questions do you receive immunity, and then that immunity is full and complete.

A. Right.

THE FOREMAN: Mr. Spinnato, just to clear the point, you mentioned that I had mentioned County and New York State, that was in connection with the scope of the investigation. It was not part or parcel of the grant of immunity.

THE WITNESS: Okay, thank you.

BY MR. SPINNATO:

Q. Do you understand that?

A. Yes, full and complete immunity.

[Minutes 9/25 at 23-25]

In response to an explicit question as to whether the immunity extended to the federal government,^{*/} Lombardo was told that the references in the grant to "county" and "state" only referred to the scope of the investigation and did not restrict the scope of the immunity, and that he had full and complete immunity. He gave testimony before the grand jury about his relationship to Michael Hellerman and Michael's Steak House (mins. 10/1/71) and was indicted by the federal government for an alleged extortionate loan to Hellerman to set up Michael's Steak House (Count 38 of 73 Cr. 699) and Hellerman was permitted to testify about this transaction. (See Point III, [a], supra)

He gave testimony before the grand jury about numerous monetary transactions between himself and other individuals (e.g., Thomas Petrizzo, Sebastian "Buster" Alois, Philip Yanovich, etc.) and was exhaustively cross-examined about these matters at his federal trial.^{**/} (See Point III[b], supra)

In Johnson v. United States, 318 U.S. 189 (1943), the trial court had held that a defendant-witness could rely upon his privilege against self-incrimination but permitted the prosecutor to comment on the taking of the privilege. The Supreme Court held that this was

^{*/} Which also had transactional immunity statutes at that time. See Kastigar v. United States, 406 U.S. 441, 452 (1972); cf. 18 U.S.C. sections 6001 et seq., effective 12/14/71.

^{**/} The hearing court recognized that the federal trial evidence covered the same transactions as the Nassau County Grand Jury when it ruled that if New York State's grant of transactional immunity bound the federal government it would have to grant the new trial motion. (Minutes of New Trial Hearing at 89-102, 130, 134-39).

a "mockery of justice." Id. at 197.^{*/} Similarly, in Raley v. Ohio, 360 U.S. 423 (1959), the Supreme Court reversed convictions for refusal to testify before a state commission where the defendants had been told they could take the Fifth Amendment and had not been told they would automatically receive immunity if they testified:

[T]o sustain the judgment of the Ohio Supreme Court . . . after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State - convicting a citizen for exercising a privilege which the State clearly had told him was available to him. Cf. Sorrells v. United States, 287 U.S. 435, 442 . . . Here there were more than commands simply vague or even contradictory. There was active misleading. Cf. Johnson v. United States, 318 U.S. 189, 197.

[Id. at 438]

See also, People v. Masiello, 28 N.Y. 2d 287, 291 (1971)

("Fundamental fairness also suggests that a witness, who is also a potential criminal defendant, should not be misadvised concerning the scope of immunity if the grant of immunity has been amplified or explained in any way"). Cf. Cox v. Louisiana, 379 U.S. 559, 571 (1965).

The possibility that Lombardo might have testified in precisely the same manner if he had been properly advised of the scope of immunity is immaterial. Cf. Raley v. Ohio, supra, 360 U.S. at 439;

^{*/} The conviction was affirmed because defense counsel waived the error by refusing to object. Here, by contrast, Lombardo's trial counsel moved to prevent any reference to the immunized testimony at the beginning of trial (Minutes 10/30/73 at 14-16) and renewed the request throughout the trial (230-37, 4679-81, 4686-87, 4712-13, 4715).

People v. Masiello, supra, 28 N.Y.2d at 293. Furthermore, Lombardo might have refused to testify and risked contempt. Cf. Johnson v. United States, supra, 318 U.S. at 197 ("If advised by the court that his claim of privilege though granted would be employed against him, he well might never claim it"). Lastly, he might have raised legal objection to New York's right to require his testimony without being able to bind the federal government to transactional immunity.^{*/}

It is irrelevant that the statements of the Assistant District Attorney and the Grand Jury Foreman were apparently in error under Murphy v. Waterfront Commission, 378 U.S. 52, 79 (1964) (witness given state transactional immunity receives only federal use immunity). See Johnson v. United States, supra, 318 U.S. at 197. "The fact that the privilege was mistakenly granted is immaterial"; Raley v. Ohio,

^{*/} Murphy v. Waterfront Commission is not dispositive of this particular issue, because, as the Court pointed out several times, it was only deciding the minimum interjurisdictional immunity which the Fifth Amendment required jurisdiction B to grant if someone exercised his privilege against self-incrimination in jurisdiction A in the absence of an immunity statute. Id. at 79. The Court's opinion never mentioned that the state statute involved granted transactional immunity and never distinguished between use and transactional immunity statutes. Id. at 78. Since petitioners contended that states could in no way bind the federal government (and, therefore, could not compel testimony without violating a witness' federal Fifth Amendment privilege) they never argued that a state grant of transactional immunity might entitle them to more federal immunity than a state grant of use immunity. Id. at 53-54. This is precisely the argument Lombardo could have set forth if he had been properly advised. In 1970 and 1971, the meaning of Murphy, the law of interjurisdictional immunity, and the necessary scope of any immunity were all quite unclear. Kastigar v. United States, 406 U.S. 441 (1972) only settled some of these issues.

supra, 360 U.S. at 438; reversal called for although "there is no suggestion that the Commission had any intent to deceive the appellants."^{*/}

The fact that the misleading advice was given in one jurisdiction while the inquiry was suffered in another is also of no relevance. Murphy v. Waterfront Commission, supra, established that the Fifth Amendment required at least some immunity in the federal jurisdiction when immunity was given under the laws of another jurisdiction.^{**/} Raley, Johnson and Masiello, supra, established that the due process clause is violated if a defendant is injured by the use of testimony he gave under a misleading grant of immunity. The combination of these rules requires reversal here and the granting of a new trial.

^{*/} Similarly, the fact that Lombardo fleetingly discussed the scope of the immunity with his attorney (who was "not sure" of the scope) does not cure the misleading advice. People v. Masiello, supra, 28 N.Y.2d at 292: "Consequently, it is important that an official purporting to confer immunity must not misstate the scope of immunity as he views it, regardless of the fact that the witness or his lawyer may feel that the official advice is wrong as a matter of law. Moreover . . . it does not seem fair that the witness or his lawyer should be held to a better knowledge (of the scope of immunity) than (the prosecutor) whatever the fact." cf. Johnson v. United States, supra, 318 U.S. at 199.

^{**/} In Murphy, the petitioners had argued that the New York State immunity "did not purport to extend" to the federal government, Id. at 54, but the Supreme Court held it did via the "policies and purposes" of the Fifth Amendment. If the Court found a Fifth Amendment right where the petitioners disavowed it, there must be an even greater right where a witness asks for it and is told that he has it.

(b) The Prosecution Did Not Sustain the Heavy Burden of Demonstrating that All the Evidence They Used to Cross-Examine Defendant Was Derived from Untainted Sources.

Assuming, arguendo, that Lombardo did not receive federal transactional immunity (either by operation of law or under the particular circumstances of this case) he had, at least, "use and derivative use" immunity in the federal courts. (Murphy v. Waterfront Commission, 378 U.S. 52 [1964]). Accordingly, if he demonstrated:

that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.

[Murphy v. Waterfront Commission,
supra, 378 U.S. at 79 n. 18]

Commenting upon this burden in Kastigar v. United States, 406 U.S. 441 (1972) the Supreme Court said:

This burden of proof, which we affirm as appropriate, is not limited to a negation of taint; rather it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. . . . One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate, independent sources.

[Id. at 460, 461-62; emphasis added]

Perusal of the Nassau County Grand Jury minutes makes it clear that Lombardo did testify under compulsion to matters on which he was subsequently cross-examined at the federal trial.^{*/} Accordingly, the prosecution must sustain its heavy burden of demonstrating not only that it did not use tainted sources for the information used on cross-examination, but that it had independent sources.^{**/} It is submitted that this was not done.^{***/}

It is clear that this was a classic example of a parallel state-federal investigation with each side giving and receiving information from the other.

^{*/} This was recognized by both the prosecutor and the hearing judge (H. 29, 101) (References to the Hearing are designated "H"). In fact the prosecutor early in the hearing asked to be permitted to meet the burden he felt had been placed upon him (H. 29-30). The hearing judge, however, imposed the further burden on Lombardo's counsel of showing that Lombardo testified to something new before the grand jury and that the federal government used it (H. 95, 100, 101 ["Your burden is to show the grand jury testimony had some effect"], 130, 134-39). It is respectfully submitted that this imposition was erroneous and in direct contradiction to the quoted passages from Murphy and Kastigar.

^{**/} The fact that the immunized testimony was used re: cross-examination rather than direct prosecution (because Count 38 was severed) is irrelevant. The government raised this same claim in United States v. Hockenberry, 474 F.2d 247 (3d Cir., 1973) and it was emphatically rejected as "so narrow[ing use] . . . immunity as to jeopardize its adequacy as a constitutional means of requiring self-incrimination." Id. at 250.

^{***/} In this case, the same facts which show that the government did not support its burden of demonstrating no taint also show that no legitimate and independent source existed for "all of the evidence" used by the government.

John Bjorklund had been the agent in charge of the F.B.I. office for Nassau County and had been investigating the "Columbo" family and Lombardo's relation to it (H. 47, 63-64). In 1969, he became the chief investigator for the Nassau County District Attorney's Office and, continuing his investigation of the Colombo family and Lombardo, he assigned special investigator Al Smith to investigate him (H. 146). At the same time, the F.B.I. assigned agent Martin Boland to continue to investigate the Columbo family and Lombardo (H. 83, 103).

Boland met with Bjorklund and/or Smith numerous times to discuss matters of mutual interest - and Lombardo's name was mentioned almost every time (H. 53, 55, 85, 126). These meetings were before, during and after Lombardo would appear before the Nassau County Grand Jury (H. 55, 88-89). Boland was apparently advised when Lombardo was to appear before the Grand Jury and Boland admitted that he might have been outside the Grand Jury room when Lombardo testified.^{*/} (H. 69, 88-89, 124, 128, 132-39). On these occasions he would talk to Bjorklund and/or Smith about Lombardo. Bjorklund and Smith both testified they had read Lombardo's Grand Jury testimony (H. 62, 175) but that they did not reveal to Boland the questions or answers contained therein.

^{*/} Assistant District Attorney Spinnato recalled seeing "agents from other law enforcement agencies" and being told F.B.I. agents Boland and Welsh were outside the Grand Jury room (H. 22-24).

It is not being contended that Smith or Bjorklund deliberately leaked information from Lombardo's Grand Jury appearances to the F.B.I. or the S.E.C.; rather, it is contended that where state and federal law enforcement officials with a "common background" and "mutual interests" (H. 55) meet to discuss an individual who has testified before a state grand jury (and whose testimony has been read by the state officials) the government must go to extraordinary lengths to sustain its heavy burden of demonstrating an absence of taint.

On cross-examination of Mr. Smith, the prosecutor asked a question which demonstrates precisely why the government did not sustain its burden of showing no taint:

Q. Now, did you ever discuss the contents of this [Grand Jury] testimony or any questions or answers or subjects raised--strike the subjects raised--any questions and answers from the testimony with any federal officer?

A. No, sir.

[H. 163; Emphasis added]

This question and answer is very revealing in its implications: Smith never revealed precise "questions and answers" but he could not testify he never discussed the "subjects raised" during Lombardo's Grand Jury appearances. ^{*/}

^{*/} Smith admitted that he lumped together all the information that he received from outside sources and from reading the grand jury minutes and then would "try very hard" to make sure the information he gave to Boland and Fox came only from the former. Government Exhibits 7 and 8 indicate that this attempt failed because Smith had told Boland of Lombardo's past and future grand jury appearances. Bjorklund also admitted that he might have told Boland that Lombardo had been questioned before the grand jury about Petrizzo (H. 67).

In United States v. McDaniel, 482 F.2d 305 (8th Cir., 1973)

a similar problem arose. An Assistant United States Attorney had read a defendant's state grand jury testimony before he presented the case to a federal grand jury. In affirming an order vacating the conviction, the court said the government had not supported its burden of negating taint:

In so concluding, we cast no reflection upon the integrity or motives of the United States Attorney . . . But even so, the United States Attorney is subject to human frailties. Thus, although he asserts that he did not use McDaniel's testimony in any form, we cannot escape the conclusion that the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case.

[Id. at 312]

The court in McDaniel cited with approval the decision of Judge Metzner in United States v. Dornau, 359 F.Supp. 684 (S.D.N.Y., 1973), rev'd on other grds, ___ F.2d ___, slip op. 1603, 1614 n. 15 (2d Cir., 1974). In that case an Assistant United States Attorney had read a transcript of immunized testimony but could not say why or whether he had used it in presenting the case to a grand jury. In dismissing those counts of the indictment relating to the immunized testimony, Judge Metzner ruled:

It seems to me that once the subject matter was touched upon in the privileged testimony, and the prosecutor has read it, he could have used it in a variety of ways in this criminal prosecution. The possibility of such use, and the impossibility of clearly showing that the use did not occur, calls for the holding in this case that the defendants

were denied the constitutional protection
that their silence would have given them.

[Id. at 687]

Of course, it makes no difference that the prosecutors in this case did not actually read the grand jury testimony since their information came in a direct line (Boland and Fox) from those who had done so (Smith and Bjorklund).^{*/}

In Murphy v. Waterfront Commission, supra, both the majority and concurring opinions emphasized the importance of protecting an immunized individual against the misuse of his testimony by another jurisdiction, "especially . . . in our age of co-operative federalism, where the Federal and State Governments are waging a united front against many types of criminal activity," 378 U.S. at 55-56 and 91-92. Where, as here, the co-operation was so close and so continuous, the records show that the government did not meet its burden under Murphy and Kastigar and there must be a new trial.

^{*/} It is true that Boland had testified that he had certain information about some of the matters about which Lombardo testified in the grand jury before those proceedings took place. However, it was not until after Lombardo had testified and Boland had spoken with Smith and Bjorklund that Boland gave the prosecutors the information they used on cross-examination (H. 103-04, 107). Accordingly, any originally untainted information had become inextricably intertwined with tainted information by the time it got to the prosecutors and Boland cannot meet the test of being an "adequate legitimate source for all of the evidence used by the government," Kastigar, supra. Fox, of course, had no prior information about Lombardo and his relation to JCLD and Standard Container before he spoke to Smith (H. 186-87) and the information he received from Smith about this relation had come out during Lombardo's grand jury appearances; Fox was thus not an independent source of this cross-examination information. The Fox memo which seemed to contain mainly material furnished by Smith was concededly used by Littlefield for his cross-examination. Also note, no stipulation on Schreiber's testimony has been submitted, although promised by the government (H. 221).

POINT V

APPELLANT LOMBARDO WAS DENIED DUE PROCESS OF LAW BOTH BECAUSE OF THE PREJUDICE WHICH RESULTED FROM HIS BEING JOINTLY TRIED WITH APPELLANT DIOGUARDI AND BECAUSE OF THE INTRODUCTION OF IRRELEVANT AND HIGHLY INFLAMMATORY EVIDENCE BY THE PROSECUTION

A. Effect of the Joint Trial

The argument set forth in Point IV of the Brief for Appellant Aloï dealing with the prejudice suffered as a result of being tried with appellant Dioguardi are specifically incorporated herein by reference.

The contention that Dioguardi's co-defendants were deprived of their rights to both a fair and impartial jury venire and the ultimately selected jury, because of Dioguardi's notoriety and the resultant approach to jury selection of his attorney (antagonistic to that of the co-defendants), applies with particular force to appellant Lombardo.

Whereas Dioguardi's name was mentioned by over twenty potential jurors, all in all unfavorable light (see, e.g., 254, 342, 512),^{*/} and Aloï's name was mentioned by several jurors who believed he had been referred to as the head of the Columbo family (JT 253, 388), the name Lombardo was mentioned by only a single member of the panel (JT 349) and it is unclear whether that was the appellant Lombardo herein

^{*/}References to Jury Voir Dire transcript are prefaced "JT."

(JT 354-56).^{*/} Accordingly, the refusal to grant individual peremptory challenges or grant a severance from Dioguardi was particularly prejudicial to appellant Lombardo.

With regard to the prejudice which developed during the trial because of the presence of Dioguardi, both Point IV in the Brief for Appellant Aloï and Point I in the Brief for Appellant Dioguardi (dealing with evidence of uncharged crimes)^{**/} are expressly incorporated by reference.

B. Irrelevant and Inflammatory Evidence

From the outset, it was obvious that the prosecution was going to go to whatever lengths were necessary to secure a conviction in this case.^{***/}

^{*/} The juror who said she saw the name Lombardo in a story with the names Dioguardi and Fusco may have been referring to a different stock fraud indictment naming a different Lombardo. See United States v. Dioguardi, 332 F.Supp. 7, 11 (S.D. N.Y., 1971) (the Imperiale case). Perhaps intentionally, perhaps not, the prosecutor played upon the similarity of names in cross-examining appellant about a Vincent Lombardo (4802).

^{**/} This point dealt with evidence of Hellerman's connection to Dioguardi re: prior stock fraud deals. Whatever the harm from this evidence to some of the co-defendants who had been tried on those prior frauds (Belmont and Imperiale) its prejudicial effect was much greater on Lombardo who had never been involved in any way with these alleged crimes. (see preceding footnote)

^{***/} Perhaps spurred by what they no doubt believed was the improper acquittal in the prior Imperiale case.

The government's opening statement set forth their theory of this case, i.e., that it was "very important" because the defendants were the "powers behind the scenes, . . . the people who direct and organize the commission of crimes . . . the men at the top . . . [who] direct . . . their associates to go out and commit the crime" (136). Recognizing the direction in which the prosecution was heading, the court subsequently instructed the government not to "sum up" and told the jury ". . . [a]ll cases are important" (163-64).

Again and again the prosecutors sought to make explicit what the court's rulings attempted to limit to the implicit, i.e., "the fact of the matter is that this is an organized crime case" (3228). The court attempted to limit the government to proof of "an arrangement between these people [but] you don't have to say the underworld" (3228) (see also colloquies at 4335-47 and 4882-91).

This attempt failed during the trial because the government, by innuendo, made the jury aware of the alleged "underworld" personalities and connections of the appellants.

Edmond Graifer, the first government witness to testify directly against the appellants, began the assault. He testified that Charles San Filippo, alias "Charlie Lamb Chops" had introduced appellant Lombardo to him (428),^{*/} that appellant Lombardo (a married man)

^{*/} The uses of nicknames or aliases by both the appellants (with the exception of Lombardo and Savino) and most of the persons with whom they were "associated" served to create the "Mafia-esque" atmosphere in which the trial was conducted.

had a girl friend (429)^{*/} and that Lombardo had wanted to have access to a large number of cars because "he was being followed by the FBI" (430).^{**/} Graifer also began the parade of underworld jargon when he said appellant Lombardo had described Hellerman as an "honorable man" and this meant "honor among thieves" (485, 1143-44).^{***/} Graifer also testified that Sebastian Aloï was known as "Buster" (431); that his son, appellant Vincent Aloï, was known as "Big Vinny" (512), and that he had not been able to understand telephone conversations between them because they were in Italian (490). Lastly, he said that defendant Fusco (later severed) was also known as "Checko Brown" (495).

^{*/} References such as these, strewn about the record but concentrated in the cross-examination of appellants Lombardo and Dioguardi were clearly designed to alienate any average jury.

^{**/} The court chastised the government for permitting its carefully prepared witness to make this clearly improper statement but denied a mistrial or severance on the ground that the prejudice was not sufficient to warrant such relief (436-41, 449-58). Despite the prosecution's agreement that he should not have elicited this statement (457) he returned to it during appellant Lombardo's cross-examination.

This evidence was offered solely to create an impression that appellant Lombardo continually engaged in criminal activity and its introduction requires reversal for the reasons set forth in Point III of Appellant Lombardo's Brief. The same is true of Graifer's testimony about Lombardo's alleged desire for "legitimate income" (482) since the implication was that he had other "illegitimate income."

^{***/} Hellerman introduced the word "wise guys" when he said he told Graifer not to tell the SEC that he had come to Hellerman's "through any wise guys or anything" (1906). The prosecutor wanted to bring in a witness to testify that a "wise guy" was a member of "organized crime" but the court refused to permit it (3227). Counsel for appellant Dioguardi, in his summation, admitted that this was the meaning of the phrase (5245). This was particularly harmful to appellant Lombardo who had introduced Graifer to Hellerman and was, therefore, a member of organized crime.

Hellerman repeated his knowledge of all of these aliases (1718, 1723, 1724) and added the totally irrelevant but highly prejudicial information that Gary Fredericks (a severed co-indictee) was the brother-in-law of "Sonny Franchese [sic]" (1891);^{*/} he also stated that the bartender at his Steak House, Philip Yovanovich, was known as "Philly Rags" (2538).^{**/}

The cross-examination of appellant Dioguardi provided the prosecutor with opportunity to step up his "organized crime" attack. Dioguardi was asked if he knew the meaning of the terms "sit down" and "with" (4388).^{***/} whether he was an "honorable man" (4391-92) and whether one of his "associates" had brought someone to him for an "audience" (4402).^{****/} He was asked if he had any Teamster Union

^{*/} The most recent exploits of this notorious individual are referred to in *United States v. Franzese*, 321 F.Supp. 993, 994, 995 n. 2 (E.D.N.Y., 1970), *aff'd*, 438 F.2d 536 (2d Cir., 1971).

^{**/} The vice of such colorful but superficially innocuous testimony was made clear by the prosecutor's direct examination of Murray Winter. After Winter repeated Hellerman's testimony that Yovanovich was "Philly Rags" and that he got the name because he had a supply of clothes that he sold "at ridiculously low prices," he was asked if he had ever been told where "Philly" had gotten the clothes, but an objection was sustained (3238-39). The jury, however, had gotten the desired inference, i.e., that Rags was a dealer in stolen goods. This redounded to appellant Lombardo's disadvantage because he explained his friendship with the bartender by saying that he got him insurance leads. Because of the implication the jury drew from the nickname, this acquaintance was turned against Lombardo.

^{***/} The prosecutor had previously elicited testimony that "with" meant associated in a business relationship (3469, 3472).

^{****/} Upon being told that the court was going to permit these questions Alois's trial counsel had, perhaps jokingly, but with good reason, said, "I think you had better ask the jurors if they saw the picture 'The Godfather.' Judge, this thing is so obvious it isn't even funny" (4341).

or knew Jimmy Hoffa (4418),^{*/} if he had introduced Heller man to Hoffa's wife (4431-32), if he knew that Heller man Steak House was a "hangout" and whether he had met Sonny Franzese (4446-47) and "Paulie Barry" (4448)^{**/} there.

The cross-examination of appellant Lombardo, virtually the last testimony the jury heard, followed the by-now familiar pattern. He was asked if he knew the aliases of his co-appellants and others mentioned in the trial (see, e.g., 4663-64, 4669-70, 5381-82, 5385 ["Big Al"]), he was asked about his girl friend^{***/} and his use of her married name (4696, 4866, 4907-13), about "switching" cars (4903, 4906),^{****/} about loansharking (see Point III, supra) and about whether he knew various persons including the infamous Joey Gallo (4978).

The prosecutor closed the case by reiterating his theory that this was a "major crime" case dealing with the "special relationships" within a "criminal group" (5390, 5403, 5405).^{*****/}

^{*/} At least one prospective juror said she had read of Dioguardi in connection with Hoffa's "Teamsters Union and crime" (JT 404-05).

^{**/} This is an obvious distortion of "Paulie Vario," a well known criminal. It is interesting that in another case the prosecutor said that Peter Vario's name was put on an indictment so that the jury could hear evidence about "his father Paul . . . a big man." New York Times, 4/25/74, p. 51, col. 1.

^{***/} Just before a weekend break (4696).

^{****/} Although the court had ruled it too prejudicial (449-58).

^{*****/} The court's attempts to stop the prosecutor from pursuing this line of argument (5390, 5405) were unavailing (5416, 5417, 5427).

Turning first to the repeated references to aliases it should be noted that "the practice has been . . . condemned." United States v. Grayson, 166 F.2d 863, 867 (2d Cir., 1948). Since all of the witnesses who testified knew the persons about whom they testified by their full names there was absolutely no need for the alias testimony (United States v. Dioguardi, 428 F.2d 1033, 1040 [2d Cir., 1970]).^{*/}

Where the alias is not relevant to identify a defendant or other person it "can serve no purpose but to arouse suspicion that the accused is a person who has found it useful or necessary to conceal his identity." United States v. Grayson, supra, 166 F.2d at 867. It is "inherently prejudicial" (United States v. Monroe, 164 F.2d 471, 476 [2d Cir., 1947]), and will "incite the . . . jury to prejudge the case" (Lefco v. United States, 74 F.2d 66, 70 [3d Cir., 1934]).

In recognition of this, the trial court granted a motion to strike all of the aliases from the indictment^{**/} (See Memo of 7/17/73 set forth

^{*/} Dioguardi's conviction was affirmed in this case (a) because the testimony was of an "abbreviation ["Dio"], unlike a true alias," and (b) because the defense itself introduced the name "Dio" to the jurors in its pre-trial publicity motions. In this case, by contrast, the names were not abbreviations (Checko Brown, etc.) and defense counsel sought a severance because of Dioguardi's name. See Brief for Appellant Aloï, Point IV.

^{**/} In fact, it appears that the deletions were not made until some time during the trial itself (). The cover sheets for the two days of jury voir dire both show the presence of the aliases in the case caption. It also appears that the aliases were still present in the case caption on the copy of the indictment exhibited by the prosecutor to the jury during his opening statement ().

in the Supplemental Appendix). The court did rule that it would permit the introduction of this evidence, however (Ibid.), and it is contended that this was error.^{*/}

If the references to aliases in the indictment would "unduly prejudice" the defendants (Ibid.) it is difficult to see how the introduction of testimony to the same effect would not, especially where "the principal use to which the aliases were put was to indicate to the jury that people who use aliases are inherently suspect." United States v. Wilkerson, 456 F.2d 57, 59 (6th Cir., 1972).^{**}

It is true that only passing reference to appellant Lombardo's use of another name was made (4907-13). However, all of the references to his co-defendants and others using other names was equally prejudicial to him because this was a conspiracy case and the government argued repeatedly that he was "associated" with these people.^{***/}

^{*/} This was similar to the court's striking of the loanshark count while permitting in evidence thereof. See Point II, supra.

^{**/} The conviction was affirmed in Wilkerson despite this error because of the overwhelming proof against the defendants. In view of the numerous acquittals and other flaws on the prosecutor's proof the same may not be said of this case. Furthermore, the failure of the trial court to instruct the jury that "no connotation of criminality could attach to the use of an alias" (United States v. Monroe, supra, 164 F.2d at 476) rebuts any "harmless error" claim. See also United States v. Beedle, 463 F.2d 721, 725 (3d Cir., 1972).

^{***/} Because of her great familiarity with one of the defendants, as evidenced by her knowledge of his nickname, one of the potential jurors was dismissed for cause (JT 266). Appellant Lombardo's knowledge of the "other names" of his co-defendants established so close a tie between them that the use of the "other names" prejudiced him as well as them.

The infection of the aliases into the trial proceedings could only have significance here as a matter of misconduct or of general prejudice, which so substantially permeated and infected the atmosphere as to prevent the accused from having a fair trial.

[Petrilli v. United States, 129 F.2d 101, 104 (8th Cir., 1942)]

Turning next to the "organized crime" atmosphere in the case, it is clear that this too deprived all of the appellants of a fair trial. From the beginning of the trial to the end the transcript of this case is littered with references which could only have convinced the jury (as the prosecutor repeatedly said they wanted to) that the individuals on trial before them were members of organized crime--the Mafia. No other purpose could have been served by the use of underworld terms ("sit down," "honorable man," etc.) the references to notorious criminal figures (Jimmy Hoffa, Sonny Franzese, Joey Gallo, Paulie Vario) and the use of organized crime terms ("with," "associates," etc.).

This was not a case where these references to persons or things were relevant to any issue in the case (Compare United States v. Dorfman, 470 F.2d 246, 249 [2d Cir., 1972]). Evidence of association with criminals has frequently led to reversal because it permits guilt to be inferred from a "'birds of a feather' theory of justice. Guilt however, cannot be inferred merely by association." United States v. De Cicco, 435 F.2d 478, 483 (2d Cir., 1970).

In United States v. Tomaiolo, 249 F.2d 683 (2d Cir., 1957), a conviction was reversed because, inter alia, the prosecutor tried to show that the defendant had "associated" with a criminal named "Charley Whoppy." Furthermore here, as there, "No instruction was given . . . in the court's charge to the effect that the evidence regarding association with criminals should be entirely disregarded" Id. at 689.

Appellant Lombardo and his co-appellants were on trial for alleged violations of the securities laws. They were not on trial for having nicknames or aliases, or for knowing or associating with people who did. Neither were they on trial for being members of organized crime or for knowing or association with people who were. The introduction of enormous amounts of irrelevant and highly prejudicial evidence on these matters, reinforced by the prosecution's opening and closing statements, and unmitigated by any corrective or curative action by the court, poisoned the jury's minds and deprived the appellants of a fair trial. United States v. Haupt, 136 F.2d 661, 673-74 (7th Cir., 1943).

POINT VI

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY TAKING INTO ACCOUNT IN SENTENCING APPELLANT LOMBARDO'S ALLEGED PERJURY DURING THE TRIAL AND HIS ALLEGED MEMBERSHIP IN ORGANIZED CRIME

The trial court stated at the time of sentence that it felt appellant Lombardo was "more physically involved . . . but . . . in a less authoritative capacity" than any of the convicted defendants (S. 24).^{*/} Since appellant Lombardo has no prior criminal record, and since the crimes involved in this case are not crimes of violence, it is difficult, at first, to understand why he received the harsh sentence of five years in prison plus enormous fines. The answer lies in the fact that the court took into account two impermissible allegations: (1) the assertion that appellant Lombardo was a major loanshark and a member of organized crime^{**/} and (2) the assertion that he had committed perjury.^{***/}

^{*/} All references to the sentence minutes of February 5, 1974 are designated "S."

^{**/} The court had entertained the belief that appellant Lombardo was a loanshark throughout the trial. Although it refused to permit Graifer to testify that appellant Lombardo was his partner and set him up in the loanshark business, the court said it knew this was true (and denied a motion for a mistrial because of that knowledge [1123, cf. 3870-72]) (In fact, there was testimony that one Joseph Sardone was Graifer's partner [2711, 2827]).

^{***/} Since it was the judge's conclusion that appellant Lombardo committed perjury when he denied being a loanshark this naturally led the court to give credence to the prosecutor's claim that appellant Lombardo was a loanshark. The two sentencing factors [cont'd next page]

The assertion that appellant Lombardo was a "major loanshark" and member of organized crime (S. 7, 8, 9-10) was made throughout the trial (see Points II and V, supra). Although defense counsel challenged the prosecutor to bring forth the testimony of a single person to support these charges (particularly since the prosecution had had what they considered to be records of loanshark transactions since 1971) this was not done (S. 13, 21, 22).^{*/} Furthermore it was pointed out that appellant Lombardo had been extensively questioned by a Nassau County Grand Jury about whether his loans, e.g., to Petrizzo, were usurious and he was never indicted for perjury for his denials (S. 13, 16-17).

The use of probation reports in sentencing proceedings has been justified in part (against claims of hearsay, etc.) on the ground that they are prepared by disinterested parties. The "recommendations" of the prosecutors here, however, were prepared by the most partisan of sources, and their references to "FBI reports" (S. 9, 10) show how far they were willing to go to "get" appellant Lombardo.

In Masiello v. Norton, 364 F.Supp. 1133, 1135-37 (D.Conn., 1973) it was held that labelling a person a member of "organized

therefore, interrelated, and if either one should not have been considered then neither should the other. Accordingly, a finding that either was impermissably used means that both were and there would be twice the need for resentence.

^{*/} Hellerman did testify to a single loan in 1969 but this does not make appellant Lombardo a "major" loanshark. Graifer offered no testimony in support of this allegation; nor is there a scintilla of evidence in his testimony of the numerous trips to Florida that appellant Lombardo either got money from or gave money to Sebastian Aloï, from whom the government says he "inherited" his loanshark operation (S. 9-10).

crime" without some type of adversary proceeding (less than a "trial-type" procedure) deprived the prisoner of due process. The court noted that "The phrase 'organized crime figure' may, unless carefully defined, be misconstrued and misapplied." Id. at 1135. If a previously sentenced prisoner has such a right a fortiori a convicted but not-yet-sentenced defendant has it too. Accordingly, the failure of the court to hold such a hearing requires a remand for resentence.^{*/}

It is clear that the court believed appellant Lombardo was guilty of perjury and took this into account at sentencing (5616-17; "Obviously it is going to have a bearing on the sentence," S. 23, 24). This was error.

In Scott v. United States, 419 F.2d 264 (D.C.Cir., 1969) it was held that it was impermissible to take into consideration the court's belief that an accused had committed perjury while testifying.

There are two arguments why this belief would properly influence the choice of a sentence: (1) that additional punishment should be imposed for the independent substantive offense of perjury; (2) that the commission of perjury reflected adversely upon the appellant's prospects for rehabilitation, and therefore justified a lengthier sentence for the crime of robbery.

The first argument deserves emphatic rejection. The Government could if it wished prosecute the appellant for perjury. In such a proceeding, the appellant would have all the protections of a criminal trial. If the trial judge in fact imposed additional punish-

^{*/} Point VIII of the Brief for Appellant Aloia, alleging related sentencing errors, is specifically incorporated by reference.

ment upon the appellant for the supposed commission of perjury, he plainly denied the appellant the trial upon that offense to which Scott was entitled.

As for the second argument, the peculiar pressures placed upon a defendant threatened with jail and the stigma of conviction make his willingness to deny the crime an unpromising test of his prospects for rehabilitation if guilty. It is indeed unlikely that many men who commit serious offenses would balk on principle from lying in their own defense. The guilty man may quite sincerely repent his crime but yet, driven by the urge to remain free, may protest his innocence in a court of law. This realization, indeed, unquestionably accounts for the extreme infrequency with which convicted criminals are in fact prosecuted for perjury committed at their trials.

The Government argues that the appellant "has no constitutional right to lie." The beguiling simplicity of this proposition misphrases the question. Of course a defendant has no constitutional right to lie, however much we may sympathize with his too human temptation. But the defendant does have a right to testify in his own defense. In doing so, he risks the jury's disbelief. If he in fact fails to convince the jurors, conviction and punishment will follow. If the Government for whatever reason concludes that prosecution for perjury is appropriate, he risks punishment for that as well. To allow the trial judge to impose still further punishment because he too disbelieves the defendant would needlessly discourage the accused from testifying in his own behalf.

[Id. at 268-69; citations omitted]

Although there is authority to the contrary [see United States v. Moore, 484 F.2d 1284 (6th Cir., 1973)], but cf. Craven J., concurring on constraint but actually dissenting, Id. at 1288-89) appellant Lombardo suggests that Scott sets forth the better rule and should be adopted by the Circuit.

POINT VII

PURSUANT TO RULE 28(i) OF THE
FEDERAL RULES OF APPELLATE PROCEDURE,
APPELLANT LOMBARDO HEREBY INCORPORATES BY
REFERENCE ALL POINTS AND ARGUMENTS
OF CO-APPELLANTS INsofar AS
THEY ARE APPLICABLE TO HIM

Where errors as to one defendant
are so substantial and of such nature as
to affect a co-defendant with whom he is
tried jointly, appellate courts have re-
versed the convictions of both defendants
on trial where it seemed they could not
have been fairly tried.

[United States v. Tomaiolo, 249 F.2d
683, 696 (2d Cir., 1957)]

CONCLUSION

For the above-stated reasons, the judgment of conviction appealed
from must be reversed and the indictment dismissed or, in the alterna-
tive, there must be a remand for a new trial; at the least, the case must
be remanded for resentence.

Respectfully submitted,

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